Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
-- Competitive Bidding for Commercial	)	
Broadcast and Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 25, 1997 ; Released: November 26, 1997

By the Commission: Commissioners Powell and Tristani issuing separate statements.

Comment Date: [45 days after publication in the Federal Register]
Reply Comment Date: [65 days after publication in the Federal Register]

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I. INTRODUCTION

1. On August 5, 1997, President Clinton signed the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which expanded the Commission's competitive bidding authority under section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), to include mutually exclusive initial license applications for certain types of broadcast stations. In this Notice of Proposed Rulemaking, we propose general competitive bidding procedures for all auctionable broadcast services within the scope of amended section 309(j) except for certain digital television services. The proposed rules implement the statutory requirement set forth in section 309(j)(1) that, except for certain commercial broadcast applications filed before July 1, 1997 and for categories of broadcast service expressly exempted from the Commission's auction authority under section 309(j)(2), we must use auctions to resolve mutually exclusive applications for initial licenses for broadcast stations. We also propose to use auctions to decide among competing applications filed before July 1, 1997 for new commercial radio and television broadcast stations. We tentatively conclude that resolving the latter cases by competitive bidding procedures, rather than comparative hearings, better serves the public interest by expediting the resolution of applications, many of which have been pending for several years. We do, however, ask for comment on whether we should instead use comparative hearings for some or all of these cases. We also seek comment on whether we are required to use auctions to resolve mutually exclusive applications to provide Instructional Television Fixed Service (ITFS). Finally, we seek further comment on proposals for resolving pending comparative broadcast renewal proceedings, in light of whatever decision we make on pending pre-July 1 applications for new stations.

II. BACKGROUND

2. The Commission has traditionally used comparative hearings to decide among mutually exclusive applications for new full service commercial radio and television stations. In 1965, in an effort to inject clarity and consistency into the comparative hearing process, the

Commission articulated two primary objectives toward which the comparative process should be directed: (1) best practicable service to the public; and (2) maximum diffusion of control of the media of mass communications. Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965). Diversification of media control was deemed to have primary significance in the Commission's licensing scheme, followed by several factors having relevance in predicting which of several applicants offers the best practicable service: (1) "integration" of ownership and management, which presumed that an owner integrated into the station's day-to-day management would provide better service; (2) local residence; (3) the applicant's past broadcast record; (4) proposed program service; (5) efficient use of the frequency; and (6) broadcast experience based on the applicant's past activities without ownership responsibility. Additionally, following the court's decision in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), the Commission also awarded comparative credit for minority ownership and later, until reversed in court, for female ownership See Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

3. In 1989, the Commission initiated a proceeding to explore the possibility of using random selection procedures or lotteries to award licenses for new full service radio and television stations. Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection, 4 FCC Rcd 2256 (1989), terminated, 5 FCC Rcd 4002 (1990). The Commission ultimately decided that it would focus on reforming the traditional comparative hearing process, id. at 4002 ¶ 3, but it identified several problems with the process that are still of some concern today: comparative hearings can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits in terms of selecting the "better" applicant, because the selection often turns on minimal distinctions. 4 FCC Rcd at 2256 ¶ 2.

4. More recently, litigation involving the integration criterion has led to substantial delays in resolving comparative broadcast proceedings. Analysis under the integration factor involves a complex, two-step process, whereby the applicant is awarded quantitative credit reflecting the total ownership interests of those with managerial roles, which may then be enhanced by a variety of qualitative attributes, such as local ownership, broadcast experience and minority ownership. In Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) (Bechtel I), the United States Court of Appeals for the District of Columbia Circuit remanded a comparative proceeding in which an unsuccessful applicant had challenged the Commission's continued reliance on the integration criterion. It directed the Commission to "demonstrate why its focus on integration is still in the public interest." Id. at 881. A similar remand was ordered in Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992), in which the court again directed the Commission "to confront challenges to its integration policy, and, in view of documented changes in factual and legal circumstances, to articulate reasons why, despite those changes, the policy should be applied to a particular case." Id. at 1571. On two separate occasions in the Bechtel litigation, both before and after the intervening Flagstaff

decision, the Commission sought to explain its continued reliance on integration, Anchor Broadcasting Limited Partnership, 7 FCC Rcd 4566 (1992), modified, 8 FCC Rcd 1674 (1993). But the court ultimately concluded that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993) (Bechtel II). Specifically, the court rejected as "implausible" the claimed benefits of integration. It noted that, "[d]espite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it, [and that] . . . the predictions at the root of the integration policy [i.e., that integrated owners will provide better service to the public] seem rather implausible." Id. at 880. Apart from the lack of evidence supporting the policy, the court also cited the "lack of permanence" of any such benefits of integration since licensees are not required to adhere to their proposals on a permanent basis, id. at 879-880, and it characterized the central importance placed on integration as "remarkable," given the many other factors that can affect a station's performance. Id. at 882.

5. Noting the court's skepticism in Bechtel I that the Commission could justify its continued reliance on the integration factor and the fact that the comparative criteria had not been reviewed comprehensively since the 1965 Policy Statement, the Commission issued a notice of proposed rulemaking in GC Docket No. 92-52 to reexamine the comparative criteria used to select among mutually exclusive applicants for new broadcast facilities.[1] Following Bechtel I, the Commission issued a further notice of proposed rulemaking (FNPRM) proposing to amend 47 C.F.R. § 73.3597(a), which governs the transfer or assignment of broadcast authorizations, to lengthen the period of time that a successful applicant receiving a grant after a comparative hearing must operate their stations before becoming eligible to transfer them.[2] After Bechtel II, the Commission issued a second FNPRM seeking comment on a variety of issues raised by that decision.[3] Because integration and the related qualitative enhancement factors have been crucial factors in recent comparative cases, the Commission,

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[1] Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 2664 (1992). Although we initially suggested that some aspects of the comparative system adopted in this proceeding might be applicable to full service noncommercial stations, we have since commenced a separate proceeding concerning the criteria to be used in comparing applicants for noncommercial facilities. See Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, 10 FCC Rcd 2877 (1995). Moreover, under amended section 309(j), the Commission may not use auctions for noncommercial educational broadcast stations. See § 3002(a)(1)(A)(2)(C), Balanced Budget Act ("The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission . . . (C) for stations described in section 397(6) of this Act."). Therefore, we will not consider the question of full service noncommercial stations further in this proceeding.

[2] Further Notice of Proposed Rulemaking, 8 FCC Rcd 5475 (1993). Related issues were raised in a petition for rulemaking filed by Black Citizens for Fair Media in GEN Docket No. 90-264 and in responsive comments.

[3] Second Further Notice of Proposed Rulemaking, 9 FCC Rcd 2821 (1994). A list of commenters in these various rulemaking proceedings is attached as Appendix A.

since 1994, has stayed all ongoing comparative cases pending resolution of the issues raised by Bechtel II.[4]

6. Against this regulatory background, Congress, as part of the Balanced Budget Act of 1997, amended section 309(j) of the Communications Act to require expressly that the Commission use competitive bidding procedures to resolve most initial licensing proceedings involving mutually exclusive applications. Prior to these amendments, section 309(j) had authorized, but had not required, the Commission to use competitive bidding under certain circumstances, and, moreover, had not authorized the use of competitive bidding to award broadcast licenses.[5] Under the 1997 amendments, if mutually exclusive applications for any initial license or construction permit are accepted, the Commission must grant the license or permit to a qualified applicant through a system of competitive bidding. Balanced Budget Act of 1997, § 3002(a)(1)(A), codified as 47 U.S.C. § 309(j). Section 3002(a)(2) provides, however, that the Commission's competitive bidding authority does not apply to licenses or construction permits for "initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses."[6]

7. In addition, new section 309(l) expressly deals with the resolution of pending comparative broadcast initial licensing cases. With respect to competing applications for initial licenses for commercial radio and television stations filed with the Commission before July 1, 1997, section 309(l) provides: (1) that the Commission has the authority to conduct a competitive bidding proceeding pursuant to section 309(j) to award such licenses or permits; (2) that it must treat persons filing such applications as the only persons eligible to be qualified bidders; and (3) that, for a period of 180 days beginning on the date of enactment of the Balanced Budget Act of 1997, the Commission must waive any provision of its regulations necessary to permit such persons to enter into an agreement to procure the removal of a conflict between their applications.

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[4]Public Notice: FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689 (1994), further modified, 10 FCC Rcd 12182 (1995). See also Letter, dated January 9, 1997, from Senator John McCain, Chairman of the Senate Commerce Committee, to Reed Hundt, Chairman of the Federal Communications Commission, requesting that "the Commission take no action on new rules [i.e., comparative criteria for broadcast licensing proceedings] until Congress considers legislation, which I intend to introduce in the near future, that will authorize the Commission to auction these licenses."

[5]See Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Second Report and Order), 9 FCC Rcd 2348, 2352 ¶¶ 21-22 (1994), recon. granted in part, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) ("Second Report and Order").

[6]The Balanced Budget Act amendments also provide that the Commission's competitive bidding authority does not extend to licenses or construction permits for public safety radio use and stations defined by section 397(6) of the Act (i.e., noncommercial educational broadcast stations and public broadcast stations). Id.

8. Finally, Congress through the Balanced Budget Act has amended section 309(i) of the Act, which governs the award of licenses through random selection. These amendments provide that, except for the award of licenses or permits for stations described by section 397(6) of the Act, the Commission's lottery authority expires on July 1, 1997. Id. at § 3002(a)(2).

III. DISCUSSION

A. Overview

9. The enactment of the Balanced Budget Act of 1997 has significantly affected the issues relating to the Commission's procedures for selecting among competing broadcast applicants. At the time the Commission issued the NPRM and the two Further NPRMs in GC Docket No. 92-52, it had statutory authority to decide mutually exclusive applications for initial broadcast licenses for new television or radio stations only by comparative hearing or, potentially, by a random selection procedure conducted pursuant to section 309(i). Accordingly, the Commission sought comment on the continued use of comparative hearings, the development of comparative criteria in light of Bechtel and regulatory changes since adoption of the existing criteria, and on the use of a tie-breaker lottery. However, as noted above, Congress has now repealed the Commission's authority to decide such cases by a random selection system conducted pursuant to section 309(i). It has also expanded the Commission's authority to choose among mutually exclusive applications for initial broadcast licenses or permits through a competitive bidding system.

10. With this statutory framework in mind, and as required by the Balanced Budget Act, we propose below auction rules that will be used to decide mutually exclusive applications for any initial license or construction permit for a commercial radio or analog television station filed after June 30, 1997, and all pending and future mutually exclusive applications for a construction permit to provide a variety of Part 74 secondary commercial broadcast services that are not already subject to competitive bidding procedures, including low power television service and FM and television translator service.[7] See Section C 2, below. We also seek comment on whether to treat all pending and future mutually exclusive applications to modify existing facilities in the broadcast and secondary broadcast services as initial applications that are auctionable under amended section 309(j)(1). See ¶ 47, below. We also propose to use auctions for pending mutually exclusive applications for new commercial full power broadcast stations filed before July 1, 1997, although we seek comment on whether we should use comparative hearings for all or a subset of such

[7]Only commercial stations in these services will be covered.

applications. See Section B, below. We note that competitive bidding procedures for future digital television services, which are not within the exemption set forth in section 309(j)(2)(B), will be addressed in a future rulemaking proceeding.

11. As discussed in greater detail in section C below, we propose to adhere to the general competitive bidding procedures, set forth in 47 C.F.R. §§ 1.2101-1.2111, prescribed by the Commission to implement section 309(j) and employed to resolve mutually exclusive initial license applications, subject to whatever changes that we make in those general procedures. See Amendment of Part 1 of the Commission's Rules--Competitive Bidding Proceeding, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 12 FCC Rcd 5686 (1997) (hereafter Part 1 NPRM or Part 1 Order). And, in accordance with new section 309(j)(3)(F) of the Act, commenters will have an adequate period for notice and comment on our proposed auction rules for initial licenses or construction permits for commercial radio and analog television stations and other services addressed here, as well as sufficient time after adoption of the final bidding rules to develop business plans, assess market conditions, and evaluate the availability of equipment.

12. Finally, we address issues relating to ITFS applications and the few remaining broadcast comparative renewal proceedings. See Sections D and E below.

B. Proposals for Pending Broadcast Initial Licensing Proceedings

13. New section 309(l) of the Communications Act expressly governs "competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997," and provides that "the Commission shall . . . have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit." Based upon its language, we tentatively conclude that new section 309(l) accords the Commission the discretion to use competitive bidding to select among pending mutually exclusive applications filed before July 1, 1997. The Conference Report states, however, that the section "requires the Commission to use auctions for mutually exclusive applications filed before July 1, 1997."[8] We therefore seek comment on whether the Balanced Budget Act of 1997 should be construed to require auctions for pre-July 1, 1997 applications, particularly since such applications are not included in the listed exemptions to the requirement for auctions under amended section 309(j) of the Act. For purposes of this NPRM, however, we assume that we have discretion regarding the use of auctions to resolve mutually exclusive applications filed before July 1, 1997.

14. We also tentatively conclude that using auctions to resolve pending comparative

[8]H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) (Conference Report) (emphasis added).

licensing cases better serves the public interest than deciding them by comparative hearing although we ask for comment on whether we should continue to use comparative hearings for some or all of these cases. We note at the outset that pending applicants have no vested right to a comparative hearing under the statute.[9] Even in the absence of legislation expressly authorizing the application of the new procedures to pending applications, we have broad rulemaking authority to revise our processing rules and to apply the new rules to pending applicants.[10] Such authority depends not on whether the new rules comport with the applicants' expectations based upon prior law, but on whether the determination to change our rules is arbitrary and capricious.[11]

15. Our tentative view is that any unfairness in using auctions to decide these cases is not strong enough in and of itself to cause us not to consider holding auctions in these cases.[12] None of the pre-July 1, 1997 applicants filed with the expectation of participating in an auction. The vast majority, however, filed after both Bechtel II and the initiation of the Commission's comparative freeze, when there was no established system for selecting among mutually exclusive broadcast applications. These applicants may have filed with the expectation of participating in a comparative hearing, but it is unlikely that they reasonably could have filed in reliance on any particular selection criteria. Even for those applicants who relied in good faith on existing selection procedures, the express holding in Bechtel II, 10 F.3d at 878, that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful" prevents us from deciding pending cases completely in accordance with the applicants' reasonable expectations at the time of filing.

16. Additionally, with respect to equity issues, in view of our tentative determination not to conduct hearings in these cases, we propose to refund, upon request, all hearing fees paid by applicants in proceedings in which we select the permittee by competitive bidding. And, as a matter of fairness, we tentatively propose to refund, upon request, filing fees paid by those applicants choosing not to participate in the auction. All such refunds would be paid

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[9] See Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989) (upholding the dismissal without a comparative hearing of a pending non-local ITFS application pursuant to the subsequently adopted one-year priority period during which local ITFS applicants had absolute priority over all non-local ITFS applicants).

[10] See Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (upholding decision to decide pending cellular cases by lottery rather than by comparative hearing). See also Chadmoore Communications, Inc. v. FCC, No. 96-1061 (D.C. Cir. May 20, 1997) (upholding the denial of an application for an extension of the construction period based on a subsequently adopted rule disallowing such extensions, because no right to an extension vested upon the filing of the application).

[11] See DIRECTV v. FCC, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (upholding decision to auction reclaimed DBS spectrum despite the Commission's previous announcement that it would be assigned on a pro rata basis to existing licensees).

[12] But see the discussion in ¶¶ 21-22.

once the grant of the construction permit to the winning bidder is final and the license has been paid for in full.

17. We also tentatively conclude that auctions would likely lead to a more speedy resolution of these pending cases, thereby serving the public interest in getting service to the public sooner. Given the Bechtel II decision and the potential difficulty of devising judicially sustainable comparative criteria based on the current record, discussed further below, we tentatively conclude that using comparative hearings to decide these long-pending cases would be likely to delay their resolution. In contrast, it appears that auctions are probably less likely to result in further administrative and judicial litigation.

18. Moreover, in reviewing the relative merits of comparative hearings and auctions with respect to other services, we note that in other contexts we have found that auctions are preferable to comparative hearings.[13] We have, in these other contexts, cited the advantages of auctions in terms of avoiding the considerable delay and substantial expenditures associated with comparative hearings; allocating spectrum to those valuing it the most and best able to serve the public; and recovering for the public a portion of the value of the spectrum that is made available for commercial use. We seek comment on the applicability of these considerations in the context of the pre-July 1 broadcast applications. In addition, we seek comment on whether competitive bidding has been established as the congressionally preferred method of awarding spectrum licenses, where mutually exclusive applications are filed, given that section 309(j) mandates auctions for most services, including certain pending secondary broadcast applications (e.g., low power television service, television translator service, FM translator service), and virtually all commercial broadcast applications filed after July 1, 1997.

19. We continue to have concerns with the potential delay, administrative costs, and uncertainty that may be associated with broadcast comparative hearings. It appears, for example, that continued consideration of integration and local residence/civic participation is effectively precluded by the court's analysis in Bechtel II, which emphasized the need for

[13] See, e.g., Establishment of Rules and Policies for the Digital Audio Radio Service, 12 FCC Rcd 5754, 5814-16 ¶¶ 149-152 (1997) (concluding that using competitive bidding procedures to assign DARS licenses will further the public interest objectives set forth in section 309(j)(3) by encouraging efficient use of the spectrum, by awarding the spectrum to the applicant valuing it the most and by expediting quality service to the public); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems, 11 FCC Rcd 1463, 1541 ¶ 150 (1995) (competitive bidding procedures minimize judicial and administrative delays associated with other licensing alternatives, including comparative hearings). See also The FCC Report to Congress on Spectrum Auctions, FCC 97-353, at 10 (adopted Sept. 30, 1997) (concluding that competitive bidding is a more efficient method of assigning spectrum licenses in cases of mutual exclusivity than any previously employed method and that, in contrast to lotteries and comparative hearings, the auction process rapidly awards licenses to productive users, encourages the emergence of innovative firms and technologies, generates valuable market information, and compensates the public for the use of the airwaves).

evidence to support these criteria. The record to date does not include persuasive evidence demonstrating the predictive value of these criteria in terms selecting the applicant that will best serve the public interest.[14] Other factors such as broadcast experience, daytimer preference, and past broadcast record are relevant, at least in theory, in predicting future broadcast performance but could also be problematic. Commenters were divided on the relevance of such factors.[15]

20. Commenters have also suggested other new comparative criteria. For example, the NAACP has proposed that we award credit to applicants promising to divest existing stations to minorities at a distress sale price. None, however, is sufficiently well-developed in the current record to warrant adoption at this time.

21. We seek comment on our proposal to use auctions, rather than comparative hearings, to decide all pending commercial radio and television comparative licensing cases, as defined by section 309(l). We also seek comment on whether, instead, we should use comparative hearings for pending cases. Those commenters advocating continued use of comparative hearings for mutually exclusive applications pending before July 1, 1997 should explain how their proposed criteria would be implemented in an administratively workable and judicially sustainable manner, and demonstrate how the proposed criteria would predict good or better service or serve some independent public interest goal.

22. We also ask for comment on whether, even if we decide to use auctions for most pre-July 1 applications, we should nevertheless use comparative hearings for a subset of such applications. We note that there are approximately eight unresolved cases involving mutually exclusive applications for new stations that progressed to a decision by the Commission, and another approximately 12 such unresolved cases that progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in Bechtel II that the integration criterion used by the Commission was unlawful. We ask for comment on whether the resources these applicants have expended, as well as the delays they have encountered, raise special equitable concerns that should lead us to have comparative hearings

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[14]Those supporting retention of these criteria offer only anecdotal evidence to demonstrate the claimed public interest benefits of these criteria. Integration: Lisa M. Harris at 3-5; Breeze Broadcasting at 4-6; Fredericksburg Channel 2 at 7-8; J&M Communications at 4-5. Local Residence: Fredericksburg at 8.

[15]Several urge that an applicant with broadcast experience will more likely be reliable and responsive owners, Arnold at 14; Cap Cities at 11-12; Jenkins at 2-3; NAACP at 17, and that it remains a viable consideration after Bechtel, Paloma at 2-3; United Reply at 3-4; Trans-Columbia at 2-3; Sun Over Jupiter at 5-7. Other commenters state experience is irrelevant because market considerations dictate what managerial style will be used, Contemporary at 2, note the problem of ensuring that experience is incorporated into the station operation, Sun at 6-7, and the possible prejudice to minority applicants, LULAC at 4-5. The comments are also divided on the relevance of the daytimer preference. Pro: JEM Broadcasting at 6-7; Miracle Radio at 2-3. Con: Black Citizens at 15 n.10; Hilding at 6; NAACP at 18.

in these cases even if we use auctions for other pending cases. We invite commenters to describe in more detail the equitable considerations that they believe would support the use of comparative hearings for such a subset of pending applicants. Commenters supporting the use of comparative hearings for such applicants should indicate which subset of applicants they believe should be covered and why. They should also indicate which specific criteria they believe should be used and, as with commenters supporting the use of comparative hearings for all pre-July 1 applications, explain how these crtieria would be consistent with Bechtel II or would otherwise serve the public interest. Commenters should also explain how the particular comparative criteria they propose further the equitable interests they have identified. In addition, commenters may wish to address the basis for any equitable discretion we may have to apply to such pending cases any comparative criteria that might not meet the standards set forth in Bechtel II. We encourage commenters supporting the use of comparative criteria for a subset of pending cases to provide as much specific information and explanation as possible, so that we can decide this issue based on as full and informed a record as possible.

C. Proposed Auction Rules

1. Rules and Procedures for Pending Comparative Licensing Cases.

23. *Scope of Section 309(l):* As discussed above, we tentatively propose to use auctions to resolve pending broadcast initial licensing proceedings that are within the scope of section 309(l). In the event the Commission uses auctions, new section 309(1) provides that "the Commission shall . . . (2) treat the persons filing such applications [i.e. competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997] as the only persons eligible to be qualified bidders." Section 309(l) also contains special provisions, discussed below, to govern the settlement of such pending application proceedings. To determine the applicability of these provisions, it is therefore important to define the scope of the proceedings covered by section 309(l).

24. Based upon the language of the statute, we tentatively conclude that section 309(l) is inapplicable where all of a group of mutually exclusive applications were filed after June 30, 1997. Under those circumstances, we tentatively construe the statute as requiring an auction under amended section 309(j)(1), which specifies that "the Commission shall . . . grant the license or permit to a qualified applicant through a system of competitive bidding . . . if mutually exclusive applications are accepted." We tentatively reach the same conclusion (i.e. that an auction is mandated under section 309(j)(1)) where one application was filed by June 30, 1997 and the other mutually exclusive applications were filed thereafter. Nothing in new section 309(l), or in the accompanying legislative history, suggests that it applies to a single application on file before July 1, 1997, rather than to "competing

applications" filed before that date. Thus, neither the section 309(l) provision limiting eligible bidders nor the settlement provision applies to that single application. This interpretation is confirmed by the legislative history, at least with respect to situations in which the Commission has not yet opened a filing window or established a deadline for the filing of mutually exclusive applications:

> The conferees recognize that there are instances where a single application for a radio or television station has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window. In these instances, the conferees expect that, regardless of whether the application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed. Furthermore, if and when competing applications are filed, the Commission shall assign such licenses using the competitive bidding procedures developed under section 309(j) as amended.

Conference Report at 573-74.

25. Where two or more mutually exclusive applications were filed before July 1, 1997, however, we tentatively conclude that the new section 309(l) applies. Under those circumstances, the statute specifies that, if competitive bidding procedures are employed to resolve competing applications filed before July 1, 1997, "the Commission shall . . . treat the persons filing such applications [i.e. before July 1, 1997] as the only persons eligible to be qualified bidders for purposes of such proceeding." Thus, we tentatively interpret section 309(l) as prohibiting us from opening an additional filing window for new mutually exclusive applications or including as eligible bidders, applicants who filed mutually exclusive applications filed after June 30, 1997. Thus, any such applications filed after June 30, 1997 would be dismissed and the applicants would not be eligible to participate in the auction. The legislative history confirms the plain meaning of the statute in this respect: "The Commission shall limit the class of eligible applicants who may be considered qualified bidders . . . to the persons who filed applications before that date [July 1, 1997]." Conference Report at 573. We recognize that in certain circumstances, this may lead to a rather harsh result, particularly where it requires the dismissal of applicants that timely filed within an announced filing period, and we ask for comment on whether there is any other legally permissible interpretation of section 309(l).

26. *Settlements:* Section 309(l)(3) provides that for a period of 180 days following enactment of the Balanced Budget Act [i.e. August 5, 1997], the Commission "shall . . . waive any provisions of its regulations necessary to permit such persons [i.e., those filing applications before July 1, 1997] to enter an agreement to procure the removal of a conflict between their applications." We construe this provision to require that the Commission must waive applicable provisions of its regulations in all instances in which settlement agreements

are filed within the 180-day period (i.e., by February 1, 1998), although the Commission might not necessarily act on the settlement agreement within that time period. In accordance with the provision, the Commission has already waived 47 C.F.R. § 73.3525(a)(3), which limits the reimbursement of applicants in a settlement agreement to their legitimate and prudent expenses. Gonzales Broadcasting, Inc., 12 FCC Rcd 12253, 1255-56 ¶¶ 1, 10 (1997). In so doing, the Commission has indicated that, in addition to waiving applicable rules, as required by the Balanced Budget Act, it will look favorably on requests to waive certain policies in hearing cases where such waiver is necessary to facilitate settlements, such as the requirement that prevailing applicants in such settlements must adhere to divestiture promises that have been made in the context of a comparative proceeding. Id. at ¶ 10. In this regard, we note that, in order to facilitate full-market settlements among pre-July 1 applicants, consistent with the congressional policy underlying section 309(l)(3), we are inclined to waive our policy against "white knight" settlements involving the award of a permit to a non-applicant third party.[16]

27. As indicated above, we also find that the waivers mandated by section 309(l)(3) apply only to mutually exclusive applications filed before July 1, 1997. The waiver requirement would not apply, for example, to a single pre-July 1, 1997 application that is mutually exclusive with one or more applications filed after that date, even if all applications were filed pursuant to a filing period that opened before July 1, 1997. Additionally, we believe that the waiver provision applies to any settlement agreement among pre-July 1, 1997 applicants, regardless of whether all such applicants are parties to the agreement. Our view, however, is that if there is only a partial settlement agreement among the pre-July 1, 1997 applicants, we could not conduct the auction until after the expiration of the 180-day period. Further, in the event a settlement agreement were filed after the 180-day period (and prior to any auction) we do not envision that we would waive our settlement rules except in extraordinary circumstances. This approach, we believe, is consistent with Congress's apparent intention to encourage early settlements in these cases.

28. Finally, we note that, since the legislation did not waive section 311(c) of the Act, settlement agreements filed pursuant to section 309(l) of the Act must comply with section 311(c), which requires Commission approval for settlement agreements. Settlement agreements in hearing cases should be submitted to the presiding ALJ or to the Commission, depending on where the case is now pending. In non-hearing cases, settlements should be submitted to the appropriate division of the Mass Media Bureau for consideration in accordance with sections 311(c) and 309(l)(3).

29. *Special Auction Procedures for Comparative Licensing Cases.* We expect that except for the special provisions discussed above relating to settlements and eligible bidders,

[16] See Rebecca Radio of Marco, 5 FCC Rcd 937 (1990).

the auction procedures for pending mutually exclusive applications, whether designated for hearing or pending before the Mass Media Bureau, would be substantially the same as for any mutually exclusive broadcast applications that are not within the scope of section 309(l). Those general procedures are discussed in section 3, below. We also anticipate that many of the pending cases currently in hearing status, and some of the non-hearing cases, will be settled under the provisions of Section 309(l)(3). In the event that these cases are not settled, however, we believe it is appropriate to adopt special procedures to govern them.

30. *Hearing Cases.* In cases already designated for hearing, we propose that, if no settlement has been filed within the 180-day period, and once the auction rules adopted in this proceeding are effective, the ALJ (or the General Counsel on delegated authority in cases pending before the Commission) would issue an order directing that the permittee is to be determined by competitive bidding procedures from among the pending applicants eligible to participate in the auction, and indicating whether there are any unresolved questions as to a particular applicant's basic qualifications. If not, the hearing proceeding would be terminated. In the event questions remain with respect to an applicant, the hearing will be resumed in the event that applicant is the winning bidder after the auction. The Order would also specify the date by which applicants desiring to participate in the auction must submit a completed short-form application (FCC Form 175) containing the information set forth in 47 C.F.R. § 1.2105 and any service-specific rules adopted in this proceeding. We recognize that deferring questions as to the pending applicants' basic qualifications may require that we conduct a second auction if the high bidder is ultimately found disqualified, and that there are few remaining hearing cases. Thus, we seek comment on whether it would be more efficient to review the basic qualifications of the pending applicants prior to the auction. We also seek comment on procedures that should be followed in the event a settlement is submitted but is denied by the ALJ (or the General Counsel in cases pending before the Commission).

31. Also, no amendments of the applicants' pending long-form applications will be accepted until after the completion of the competitive bidding process and then only if filed by the winning bidder. We propose not to accept petitions raising new issues until after announcement of a winning bidder, and the issuance of a Public Notice announcing the acceptance of amendments to long-form applications as described, infra, ¶ 34.

32. We propose that the short-form application be submitted to, and processed by, the Mass Media Bureau, with the technical assistance of the Wireless Telecommunications Bureau, in accordance with the broadcast auction rules adopted in this proceeding. We recognize that the Mass Media Bureau, as a party to the prior hearing proceeding, is precluded by the separation of investigative and prosecuting functions prescribed by 5 U.S.C. § 554(d) of the Administrative Procedure Act from having any decision-making responsibility with respect to any remaining qualifying issues in the hearing cases. We believe, however, that reviewing FCC Form 175 to determine eligibility for claimed bidding credits and processing other administrative information relating solely to conducting the auction involves

no decision-making responsibilities that violate the separation of functions requirement.

33. We propose that, if more than one acceptable short-form application is filed leading to the determination of more than one qualified bidder for a particular construction permit, the auction will be conducted in accordance with the competitive bidding procedures then in effect for auctions generally and any applicable procedures adopted in this proceeding for commercial analog broadcast service.

34. We propose that the post-auction procedures be as follows in hearing cases. The Mass Media Bureau under delegated authority would in each case announce the identity of the winning bidder and specify the date by which the winning bidder must file any necessary amendments reporting any changes in its original long-form application and the date by which any petitions against the winning bidder must be filed. We seek comment on whether any limitation should be imposed on the filing of additional petitions to deny or enlarge issues in these cases. We propose to afford the winning bidder a period of 30 days for filing any necessary amendments and 15 days for filing a response to any new petitions raising qualifying issues.

35. After the winning bidder submits the required down payment (in the manner and time required by the rules or as specified in the order), we propose that the ALJ, or the Commission (in cases pending before the Commission), issue an order resolving any remaining hearing issues or other issues affecting the winning bidder's qualifications, and if appropriate, granting the application upon full payment of the winning bid. Cases resolved by ALJs would be subject to further Commission review in accordance with existing appeal procedures. If there are no outstanding hearing issues (including unresolved petitions to enlarge) pertaining to the winning bidder's basic qualifications, the Mass Media Bureau would rule on any new issues that are raised in any petitions filed after the termination of the hearing proceeding, and, similarly, either grant the application or designate it for hearing, if appropriate.

36. *Non-Hearing Cases.* We propose similar pre-auction procedures for the pending applications that have not been designated for hearing. We propose that all pending applicants eligible to participate in the auction pursuant to the terms of section 309(l)(2) will, in response to a public notice announcing the auction, have an opportunity to file a short-form application indicating their interest in bidding on the construction permits for which they previously filed, regardless of any question as to their basic qualifications, whether raised in an unresolved petition to deny or in a staff deficiency letter. Any such questions, including issues relating to the tenderability or acceptability of an applicant's technical proposal (in its original long-form application), will be considered after the auction. Where pending applicants fail to file such short-form applications we propose to dismiss their previously filed long-form applications. In the event mutually exclusive short-form applications are not filed for a particular construction permit, we will cancel the auction for that permit and proceed to

consider the qualifications of the only remaining applicant.

37. We do not propose to accept any petition to deny against a pending applicant prior to the auction, and except for reporting any minor changes in the short-form application, we do not propose to accept any amendments to the pending long-form application until after the close of the auction. Following the announcement of the winning bidder and and the submission of the required down payment, we propose to afford the winning bidder 30 days to make any necessary amendments to the previously filed long-form application. We realize that, as a number of these applications have been pending for some time, many winning bidders may need to amend their previously-filed long-forms, and we seek comment on whether 30 days is an appropriate period for the filing of any such amendments by winning bidders.[17] The winning bidders' long-form applications would then be placed on public notice, thereby triggering the filing window for petitions to deny.[18] Even in those instances in which the filing window for petitions to deny had fully or partially run prior to enactment of the Balanced Budget Act, we deem it appropriate to adhere to the procedures adopted herein for petitions to deny following an auction generally. We would expect to dismiss the previously filed long-form applications of the unsuccessful competing bidders following the grant of the winning bidder's construction permit. And, for these non-hearing comparative initial licensing proceedings we would propose to follow all other post-auction rules and procedures set forth in Part 1 of the Commission's Rules as well as any service-specific rules adopted in this proceeding.

38. We seek comments on these proposed procedures and invite commenters to suggest any alternative procedures. We also seek comment on whether any special provisions are warranted for these pending comparative licensing cases in the event that the winning bidder is disqualified, withdraws, or otherwise defaults.

2. Procedures for Pending Applications Not Subject to Section 309(l)

39. A broader group of mutually exclusive pending applicants is outside the scope of section 309(l). Specifically, we have pending before the Commission a number of mutually exclusive applications for secondary broadcast service licenses which are not subject to section 309(l). These include LPTV and television translator applications that were filed in

[17] We do not anticipate reviewing the long-form applications previously filed by any applicants other than the auction winners, nor do we expect to consider petitions to deny filed against any long-form application other than the winning bidder's long-form.

[18] See section 3008 of the Balanced Budget Act, providing that, where the license is awarded by competitive bidding, the Commission may specify a period of no less than five days following the Public Notice for filing petitions to deny.

response to previous filing windows and previously would have been decided by random selection. Also pending before the Commission are a small number of mutually exclusive applications for commercial FM translators. Under our current rules, mutual exclusivity among FM translator applications is resolved based upon specific criteria set forth in 47 C.F.R. § 74.1233(d)-(g), and such mutually exclusive applications are neither designated for comparative hearing nor lotteried. Finally, since the enactment of the Balanced Budget Act, applicants have continued to file applications for AM and FM construction permits in accordance with our existing filing procedures. Thus, we additionally have pending before the Commission a number of post-June 30th AM and FM applications.[19]

40. As discussed above, auctions are mandatory under section 309(j) for mutually exclusive applications for new commercial radio and television stations filed after June 30, 1997. We believe that this auction requirement applies also to all pending mutually exclusive applications for constructions permits to provide secondary broadcast service, whether filed before or after June 30, 1997. Specifically, the Commission's discretion to use competitive bidding procedures to resolve pending applications filed before July 1, 1997 under new section 309(l) is expressly limited to "competing applications for commercial radio or television stations." We tentatively construe this as encompassing only full service commercial radio or television station applications, which have traditionally been decided by comparative hearing and which are subject to the comparative freeze initiated after Bechtel. Pending secondary broadcast service applications, whether filed before or after July 1, 1997, are in our view, governed by the broad language of amended section 309(j)(1) requiring competitive bidding procedures "if mutually exclusive applications are accepted for any initial licensee or construction permit." In so concluding, we also note that subsection 309(l) is entitled "Applicability of Competitive Bidding Procedures to Pending Comparative Licensing Cases." Further, given the simultaneous changes in our lottery authority under section 309(i), a more expansive reading of "competing applications for commercial radio or television stations" would authorize us to decide by comparative hearings certain secondary service applications which, prior to enactment of the Balanced Budget Act, would have been lotteried. Nothing in the statutory language nor the legislative history indicates that this is what Congress intended. We seek comment on our tentative conclusions regarding the applicability of section 309(l) to pending secondary broadcast service applications.

41. We thus propose that pending mutually exclusive applications for construction permits to provide broadcast service or secondary broadcast service, which are not subject to the special provisions of new section 309(1), discussed in ¶¶ 23-38 above, will be subject to the general competitive bidding procedures outlined below for future broadcast applications. Additionally, depending upon what we ultimately decide regarding the auctionability under section 309(j)(1) of mutually exclusive applications to modify existing broadcast service and

[19] Because the Commission ceased to accept applications for new full service analog television stations in September 1996, no such applications were filed after June 30, 1997.

secondary broadcast service facilities, pending modification applications, whether filed before or after July 1, 1997, could also be subject to our competitive bidding procedures for broadcast applications generally.[20] However, certain minor adjustments in our proposed general competitive bidding procedures are necessary for applications filed before the effective date of those procedures.

42. With respect to the pending broadcast and secondary broadcast applications, described in ¶ 39 above, the time for filing mutually exclusive applications under our existing procedures has, in many instances, expired. In contrast to new section 309(l), which expressly restricts the group of applicants eligible to participate in an auction, section 309(j)(1) is silent on that question. It neither precludes the Commission from restricting the class of eligible bidders to the applications already on file, nor requires that the Commission reopen the filing period for additional applicants that would be eligible to participate in the auction. Thus, we appear to have discretion as to whether we conduct a closed auction that is limited to these pending mutually exclusive applications, or whether we include these applications within our first general broadcast auction, and permit new applicants to file additional applications that may be mutually exclusive with the pending applications. We ask for comment on how we should exercise this discretion, i.e., should we open the windows or keep them closed?

43. Following the effective date of the auction rules adopted in this proceeding, we propose to announce by Public Notice that there will be an auction, identify the groups of pending mutually exclusive (long-form) broadcast applications that will be resolved by competitive bidding, and the date by which those applicants must file short-form applications in order to participate in the auction. Given the simplicity and brevity of short-form applications, we do not believe that the requirement that these pending applicants confirm their interest in participating in an auction by filing a short-form application constitutes a significant burden on applicants. Moreover, applicants would need to file short-form applications so as to identify their authorized bidders, to create their FCC account numbers, and to claim status as a designated entity. The Public Notice would also specify the date by which additional applications must be filed in order to be included in that auction. In the interest of efficiency, we tentatively propose to conduct a single auction of all pending mutually exclusive broadcast applications that are not subject to the special provisions of new section 309(l). As an alternative to holding a combined auction, we ask for comment on the advantages, if any, of holding multiple auctions of pending applications (such as separate auctions for AM, FM, television and LPTV), and of including all or portions of these construction permits in the Commission's proposed quarterly auction process.[21] Such

[20]All pending mutually exclusive applications to modify existing low power television stations and television translators were filed before July 1, 1997.

[21] See Part 1 Order, 12 FCC Rcd at 5691-92 ¶ 7.

auction(s) would also include any application for any of these services filed in response to the Public Notice that was mutually exclusive with previously filed long-form applications.

44. The previously-filed, long-form application of any pending applicant who fails to file a short-form application to participate in the auction would be dismissed. Assuming that, in response to a Public Notice, mutually exclusive short-form applications were submitted by applicants that previously filed long-form applications and/or by additional applicants, the auction would proceed pursuant to our generally established procedures. We also seek comment on whether any changes are warranted in our proposed post-auction procedures for these applicants.

45. *Settlements.* We tentatively propose that, before the deadline for filing the short-form applications, pending applicants not subject to the special provisions set forth in new section 309(l) may enter into settlement agreements pursuant to section 311(c) of the Act and the Commission's rules. Nothing in amended section 309(j)(1), or in the accompanying legislative history, requires any change in the Commission's disposition of such settlement agreements. However, as noted in ¶ 73 below, there is a question as to the extent to which auction participants may enter into a settlement agreement without violating our anti-collusion rules. We tentatively conclude that permitting settlements prior to the filing of the short-form application is adequate to protect the integrity of the competitive bidding process and consistent with the anti-collusion rules. We ask for comment on whether allowing settlements prior to the short-form application deadline preserves the integrity of the auction process. And, although we have generally permitted settlements before short-form applications are filed, we ask for comment on whether the Commission should, as a matter of policy, amend its rules to prohibit such agreements now that Congress, through the Balanced Budget Act, may have established auctions as the preferred method of awarding spectrum licenses where mutually exclusive applications are accepted.

3. General Rules and Procedures for Auctions

46. *General Matters.* At the outset, we note that, although amended section 309(j)(1) refers to "initial license or construction permit," broadcast auctions will generally result in the award of "construction permits," rather than "licenses," to the winning bidders.[22] In this regard, we do not propose to modify our existing broadcast licensing procedures. Under those procedures, the Commission grants a construction permit to a successful applicant, who then

[22]We note that the Commission recently streamlined its processes to eliminate the construction permits previously required for certain minor changes to facilities for AM, FM, and TV stations, but the new procedures are not applicable to situations in which mutual exclusivity may arise. Amendment of Part 73 and 74 of the Commission's Rules to Permit Certain Minor Changes to Broadcast Facilities Without a Construction Permit, 12 FCC Rcd 12371 (1997).

has a specified period of time in which to construct its facilities. Following construction, the applicant will then file an application for a "license to cover construction permit" to obtain a license for the constructed facilities. See 47 C.F.R. § 73.3598. We recognize that our procedures are different in this respect from other services in which we have issued licenses upon receiving full payment from the winning bidder. Prospective bidders should be aware that, by paying for their construction permits, they obtain no greater rights or equities than any other permittee. They must satisfy our requirements for a license, and if they do not, we will not issue the license. Similarly, prospective bidders for various secondary services, including low power television stations and FM or television translators, should recognize that, by changing our method of assigning licenses for such facilities, we have not changed the basic character of any of these secondary services. A winning bidder who, after paying for his construction permit and satisfying the requirements for a license, receives the license will not have any greater rights vis-a-vis full service broadcast facilities than any other broadcaster licensed to provide that same secondary service.

47. Additionally, we ask for comment on whether we should treat as subject to auctions under section 309(j)(1) mutually exclusive applications for major modifications of existing FM, AM, television, LPTV, or television or FM translator facilities, as well as applications for minor modifications, which can be mutually exclusive in certain rare instances. See ¶ 72, below. As a general rule the Commission has not subjected mutually exclusive applications to modify existing facilities to competitive bidding. Second Report and Order, supra n.5, 9 FCC Rcd at 2355 ¶¶ 37-40. Nevertheless, the Commission has interpreted the operative language in section 309(j) -- "any initial license or construction permit" -- as authorizing the use of competitive bidding to resolve mutually exclusive modification applications, and it has indicated that it will consider the question of auctionability on a case-by-case basis. Id. The operative statutory language was not modified by the Balanced Budget Act, and, moreover, auctions for initial licenses are now mandatory, rather than discretionary. A somewhat different approach may be warranted here in light of our difficulties in devising administratively workable comparative criteria and the elimination of our authority to resolve any of these mutually exclusive applications by random selection. We seek comment on this issue.

48. We also seek comment on whether we should (or could) use comparative hearings to resolve certain types of mutually exclusive modification applications. Commenters proposing that comparative hearings be used for certain types of modification applications should explain what criteria would be used to resolve such hearings and an administratively workable means for doing so. They may also want to address any legal, equitable or other considerations that would militate against using competitive bidding procedures for certain types of modification applications if we decide to use auctions to resolve most mutually exclusive modification applications. Such considerations may arise in cases where modification applications implicate section 307(b) of the Communications Act.

49. We also ask for comment generally on whether we should adopt any special auction policies or procedures in the AM service or other services to accommodate section 307(b) of the Act, 47 U.S.C. § 307(b), which requires that the Commission distribute licenses among states and communities so as to "provide a fair, efficient, and equitable distribution of radio service." For example, should we have bidding credits for applicants offering service to significant "white" or "grey" areas?[23]

50. Also, whether particular applications are subject to the proposed competitive bidding procedures will depend on whether the broadcast service involved is required to be auctioned under amended section 309(j)(1), rather than on the identity of the mutually exclusive applicants. Thus, we propose to treat non-profit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. § 73.503 as a non-profit educational organization, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies. With regard to the FM service in particular, we note that this proposal will not affect the current ownership and eligibility requirements for noncommercial facilities.

51. We propose conducting all auctions of mutually exclusive broadcast applications in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, subject to any changes that we ultimately make in those rules in the ongoing Part 1 rulemaking (or this proceeding), and substantially consistent with the bidding procedures that have been employed in previous Commission auctions. The Commission proposed in the Part 1 rulemaking that such general competitive bidding rules should govern all future auctions. Part 1 NPRM, 12 FCC Rcd at 5698 ¶ 18. Accordingly, commenters may wish to review the proposed changes in the Part 1 rules, as well as the issues raised in the Part 1 NPRM, identify whatever they believe to be inappropriate in the context of broadcast auctions, and propose alternatives. Commenters advocating different procedures should explain in detail how such procedures would work and why the proposed Part 1 rules are inappropriate here.

52. *Type of Auction.* We note that the Commission has used the simultaneous multiple-round competitive bidding design in many previous auctions, and we tentatively propose to use that bidding design for broadcast auctions.[24] In so proposing, we note that simultaneous multiple-round bidding has the advantage of affording bidders more information

[23] A white area is an area that does not receive any service from a particular type of broadcast facility (e.g. a radio station or television station); a grey area is an area that receives only one such service.

[24] In a simultaneous multiple-round auction, bidding is open on all licenses or permits at once, and may remain open on all licenses until no more bids are received on any license. By contrast, in a sequential auction, licenses or permits are auctioned one at a time, and bidding ends on one license before bids are accepted for another license.

during the auction concerning the value that competing bidders place on what is being auctioned (in this case, construction permits) than is the case with single-round bidding. For this reason, simultaneous multiple-round bidding is more likely to result in the party that values the spectrum the most acquiring the permit. We seek comment on this proposal.

53. However, we also seek comment on alternate bidding designs that might be appropriate in the broadcast context. Alternative possibilities include: (1) sequential multiple-round auctions, using either oral ascending, remote or on-site electronic bidding; and (2) sequential or simultaneous single round auctions, using either remote and/or on site electronic bidding, or sealed bids. See generally 47 C.F.R. § 1.2103, as amended by Part 1 Order, 12 FCC Rcd at 5691 ¶ 6 & nn.9-12. Additionally, we have the authority under section 309(j) to explore other auction methodologies, including combinatorial bidding, which is highlighted in the new legislation.[25] We therefore invite commenters to think creatively about what type of auction would be most appropriate.

54. Commenters should consider whether the same type of auction methodology is appropriate for all mutually exclusive broadcast and secondary broadcast applications that are subject to auction under amended section 309(j)(1), or whether a different approach is warranted to resolve mutual exclusivity among certain categories of broadcast applications. Would it be appropriate, for example, to use a different bidding design for those pending applications subject to the special provisions of section 309(l)? A different bidding approach might be appropriate both because the 180-day settlement period makes it likely that a relatively small number of groups of mutually exclusive applications will be auctioned and because the provision requires that the bidding be closed to additional applications. What is the best approach for auctions involving the broader group of pending applications, discussed in ¶¶ 39-45 above, where the anti-collusion rule prohibits settlements after the filing of short-form applications and there is no statutory prohibition against additional applicants? Should the type of auction vary depending on the type of service involved, the number of licenses at stake, how many bidders are likely to participate, and the degree to which interpendence may be important to those likely to bid on a particular type of permit? Finally, commenters should address whether certain types of cases, such as those presenting the "daisy chain" scenario described in ¶ 58 below, lend themselves to the use of combinatorial bidding, which allows bidders to make "all or nothing" bids on combinations or groups of licenses. With this type of bidding, the Commission may require that, in order to be declared the high bidder, a combinatorial bid must exceed the sum of the individual bids for a license by a specified

[25] See Section 3002(a) of the Balanced Budget Act, which added the following language to section 309(j)(3): "The Commission shall, directly or by contract, provide for the design and conduct (for the purpose of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round."

amount.[26]

55. We propose that, whatever type of bidding design we ultimately select for broadcast auctions, bidding would be remote rather than on-site, thereby providing bidders the flexibility to bid from any location. We ask for comment on whether to require bidders to bid electronically via computer, or whether to give bidders the option of bidding by telephone. Unlike telephonic assisted bidding, where a third party, the bid assistant, is always placed between the bidder and the system, remote electronic bidding places total control in the hands of the bidder. The flexibility to bid, check round results, check announcements, or make a suggestion in a seamless environment, from anywhere, has proven desirable for approximately 85% of the bidders in our auctions thus far. On the other hand, a telephonic bidding option would provide bidders a safeguard against power outages, computer breakdowns, or other unforeseen circumstances that might prevent them from bidding electronically. We also seek comment on whether requiring all bidders to bid electronically would be unduly burdensome to certain bidders (such as television translator associations) likely to participate in auctions for the secondary broadcast services. For example, telephonic bidding would afford bidders the flexibility to bid from any location without incurring the expense of electronic bidding.

56. *Upfront Payments, Reserve Prices, Minimum Opening Bids, and "Daisy Chains".* We seek comment on several bidding-related issues. First, we propose that the Mass Media Bureau work in conjunction with the Wireless Telecommunications Bureau in setting the upfront payment, which will be announced by Public Notice before the time for filing short-form applications. An upfront payment is paid by prospective bidders prior to the auction. See 47 C.F.R. § 1.2106, requiring payment of the upfront payment after a prospective bidder files its short-form application. Requiring an upfront payment prior to the auction has proven a useful tool in ensuring that bidders are sincere, and we do not propose to depart from our Part 1 rules on upfront payments. However, we request comment on the appropriate amount, or method of determining an appropriate amount, of this upfront payment for bidders in broadcast auctions. In previous auctions, we have based the upfront payments upon the amount of spectrum and population (or "pops") covered by the licenses or permits for which parties intend to bid. We note that in the broadcast area there is other data, such as market size, market ratings, advertising rates and broadcast transactions, that might prove more useful than the MHz-pop formula that we have used in valuing auctionable licenses in other, less established telecommunications services. We seek comment on alternate valuation formulas that might be used to calculate upfront payments.

57. In the Balanced Budget Act, Congress directed the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid will be established for any license that is to be assigned by competitive bidding unless the Commission

[26] See The FCC Report to Congress on Spectrum Auctions, FCC 97-353, at 4, 36.

determines that such reserve prices or minimum opening bids would be contrary to the public interest.[32] We therefore propose that the Mass Media Bureau work in conjunction with the Wireless Telecommunications Bureau to consider the use of reserve prices and minimum opening bids for auctionable commercial broadcast licenses, which would be announced by Public Notice before the time for filing short-form applications, unless, as a result of the comments solicited herein, it is determined that a reserve price or minimum opening bid would not be in the public interest. In addition, we seek comment on the methodology to be employed in establishing each of these mechanisms. We note the possibility of establishing minimum opening bids at the same level as upfront payments, as was done in connection with the auction for the 800 MHz Specialized Mobile Radio service, and of using a MHz-pop formula, as is proposed for the LMDS auction.[33] We seek comment on alternative methods for estimating the value of the relevant licenses and thus for providing a basis for estimating reserve prices or minimum opening bids. Among the possible approaches to estimating license values are (1) using data on station transactions that are comparable in terms of station class and market characteristics, and (2) utilizing a financial model derived from data on the performance of operating stations (a) in the market that an applicant hopes to serve or (b) from a relevant comparable market. These methodologies might lead directly to estimated license values or they might yield MHz-pop values for a particular class of licensees that could then be combined with information on each license to generate valuation estimates. We seek comment on these and any other methodologies that interested parties believe are appropriate.

58. We also seek comment on how the Commission should deal with any "daisy chains" presented in auctions of AM radio, LPTV, or television or FM translator applications. Daisy chains occur when an application is mutually exclusive (*i.e.*, would cause interference) with a second application, which is mutually exclusive with a third application in the same or adjacent community, and so on, even though the first application may not be directly mutually exclusive with any application except the second.[34] Due to the possibility of daisy chains in

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[32]See 47 U.S.C. § 309(j)(4)(F). A "reserve price" is a price below which a license subject to auction will not be awarded. A "minimum opening bid" is a minimum value below which bids will not be accepted in the first round of an auction.

[33]Public Notice, "Auction of 800 MHz Specialized Mobile Radio Upper 10 MHz Band," DA 97-2147 (released Oct. 6, 1997); 62 Fed. Reg. 55251 (Oct. 23, 1997) (establishing minimum opening bids that are subject to reduction and setting the initial amounts at the level of upfront payments). See also Public Notice, "Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction," DA-97-2224 (released Oct. 17, 1997); 62 Fed. Reg. 55642 (Oct. 27, 1997) (proposing minimum opening bids for LMDS auction and that the Commission have the discretion to lower the minimum opening bids as it deems appropriate).

[34]These daisy chains occur due to the contour overlap rules used to determine interference for AM, LPTV, and television and FM translator applications. Because applicants apply for full service FM and television stations pursuant to allotment tables that specifically identify vacant channels, daisy chains do not generally

AM radio, LPTV, and television and FM translator auctions, there may be limited instances in these auctions where, depending on who becomes the winning bidder among a mutually exclusive group, another application (in addition to the auction winner) may become grantable, or another smaller mutually exclusive group will still exist and need to be resolved. We therefore ask for comment on appropriate methods for resolving any daisy chains in the auction context. Commenters may wish to address whether the methods used to resolve daisy chains in the lottery process (such as the holding of "sub-lotteries") are applicable in the auction context, or whether a different method or methods may be more suitable, such as the use of combinatorial bidding.

59. *Window Filing Approach*. We also believe that, to implement effectively amended section 309(j)(1)'s requirement that the Commission use competitive bidding procedures "if ... mutually exclusive applications are accepted for any initial license or construction permit," a judicious modification of our filing procedures for the various broadcast services is necessary. After consideration, we propose to implement a more uniform window filing approach for AM, FM, television, LPTV, and television and FM translators that will facilitate the determination of the groups of mutually exclusive applications for auction purposes. We request comment on the proposed window filing approach described below, and how the approach complements the Commission's existing auction application and payment procedures.

60. Currently, the broadcast and secondary broadcast services all have differing filing procedures, and none of these procedures was designed to work in conjunction with the auction of mutually exclusive applications. An applicant for an AM frequency is allowed to file at any time for a frequency on which the applicant can operate without causing or receiving interference from existing AM stations or the AM facilities proposed in pending applications. See 47 C.F.R. § 73.3571. In contrast, an applicant for a new FM station must request an unused channel identified in the Commission's FM Table of Allotments. If there is an unused FM allotment, an applicant may file for that unused channel allotment within the window filing period specified by the Commission. In the event no applications are tendered during that window filing period, applicants may file any time after the window has closed, and such applications are processed on a "first come/first serve" basis. See 47 C.F.R. § 73.3573. Similarly, prior to September 1996 when the Commission stopped accepting applications for new analog television stations, a television applicant could request an unused allotment in the Commission's Table of Allotments for television. See 47 C.F.R. § 73.3572. Contrary to these services, LPTV has a window filing procedure under which applications for new low power stations or applications for major changes in the existing facilities of low power stations are filed only during periodic filing windows that the Commission announces by public notice. See 47 C.F.R. § 73.3572(g). An LPTV applicant may file for any available

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occur in those services.